

A New Birth of Freedom: Homosexuality

Pooja Bali

Assistant professor Law, Himcapes College of Law, Badhera, Distt una

Abstract : *MARRIAGE in the modern world, and throughout history, has been an institution that every young person was supposed to aspire to be a part of. For a concept that is so deeply entwined in society that everyone is expected to be a part of it, marriage has been exclusionary since its inception towards certain communities of people. A battle between public policy, religion, and social norms is waged every time a group of people is included, or excluded, from being able to marry. The current polarizing issue is that of same-sex marriage. The institution of marriage in society is generally regarded as extending only to male-female relationships, although most marriage statutes use gender-neutral language. Whereas, many examples of acceptance of homosexual marriages has only been recently forthcoming as society is gradually becoming more permissive. This change is reflected in the increasing number of jurisdictions, which have decriminalized such acts. However, many jurisdictions have retained their statutory prohibitions on homosexual marriages despite much criticism from groups and individuals who believe that the sodomy law is obsolete and should be repealed. Hence same-sex relationships, regardless of their duration, are not legally recognized in most countries and as a result, homosexual partners are denied many of the legal and economic privileges automatically bestowed by marital status.*

What is Marriage:-

Marriages can be interpreted in both simple and complex ways. For the simple definition of marriage, the Oxford English Dictionary defines marriage as “The legal relationship between husband or wife; the relation between persons married to each other; matrimony”¹. Many other definitions that were examined define marriage as a union between a male and a female. This indicates that the non-legal definition of marriage has been evolving at a slow pace. This simplistic view of marriage is problematic. The definition of marriage needs to be viewed with respect to the societal context. The meaning of marriage also changes when social factors like religion and morality are

included in the definition of the nature and scope of marriage. When considering all such factors, the simple definition of marriage fails. Marriage, contrary to popular opinion, is not a personal relationship. It is a social institution that is constantly evolving, and any view contradicting popular views on marriage are repressed.

Religious perspective on marriage:-

One of the most common features of mainstream religions is the prescription of the rituals and rules of conduct of marriage. All three major religions in India, Hinduism, Islam, Sikhism and Christianity, prescribe their own definitions and conduct of marriage. None of them expressly have provisions for, or even acknowledge, same sex marriage. In the **Hindusim**, husband and wife are referred to, by several names. The husband is known as bhartri , because he is to support his wife; he is also known as patti, he is to protect her. A man’s half is his wife ; the wife is her husband’s best of friends; the wife is the source of Dharma, Artha, and Karma, and she is also source of Moksha.² Hindu marriages are recognized by law and are usually between a members of opposite sex. There are a few instances where people of the same sex have gotten married, although authorities refused to give official legitimacy to the marriage.³ Although there are several dharma texts that contain prohibitions of homosexuality, there are also a number of mythological stories that show homosexual experiences as natural and joyful. From an **Islamic perspective, marriage** is considered to be a legal contract or a “matrimonial contract” between two people. The bride is supposed to give consent to the marriage of her own free will. A religiously valid Islamic marriage requires a formal, binding contract. In Islam, there is a problem with even accepting people of the same sex in sexually active relationships. Muhammad is said to have prescribed the death penalty for both active and passive partners in same-sex activities. The moral

² Maha, Anu Parva, 46, 1-13.

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http://news.bbc.co.uk/2/hi/south_asia/1357249.stm
(last visited on April 7th, 2017)

¹ Oxford Advanced Learner’s Dictionary, 6th edition, p785

or theological argument behind this being that any person who performs homosexual activities challenges the harmony of God's creation, and is therefore a revolt against God. **In Sikhism, marriage** is not merely a physical, social, and legal relationship but is a spiritual one too; it is a sacred union between two souls centered on the Guru. "They are not said to be husband and wife, who merely sit together. They alone are called husband and wife, who have one light in two bodies."⁴ In the **Christian view**, there is no outright definition of marriage. There are several passages in the bible which seem to imply that marriage is a union of a man and a woman. For example, a passage in the Bible states that husbands should love their wives as Jesus loved the church.

Definition of Homosexual:-

The word homosexuals literally means as 'of the same sex, being a hybrid of the Greek prefix homo meaning 'same' and Latin root meaning 'sex'.⁵ Homosexuality is a sexual orientation characterized bisexual attraction or romantic love exclusively for people who are identified as being of the same sex. People who are homosexual, particularly males are known as 'gay', gay females are known as 'lesbians'. That is homosexual marriages, sometimes referred to as gay marriage, indicates a marriage between two persons of the same sex.⁶

Historical Background:-

Same-sex marriage, a legally or socially recognizable union between two consenting adults of the same biological sex or social gender, has been under fire for many years. Since 2001, ten countries and other nation-states have begun to legally formalize same-sex marriages, including Argentina, Canada, Iceland, the Netherlands, Belgium, Sweden, Portugal, Mexico City, Spain, South Africa, and some regions within the United States. Same-sex marriages have varied from jurisdiction to jurisdiction, which has resulted in legislative changes of marriage laws in order to meet the constitutional demands of equality established by the Founding Fathers. Other opposing nations recognize same-sex marriages as a civil rights, political, social, moral, or religious

⁴ Guru Granth Sahib, pg 788.

⁵ Older words for homosexuality, such as homophilia and inversion have fallen into disuse. Less frequently used terms are queer, homo, fag or faggot and dyke.

⁶ Homosexual marriages are also known as gender-neutral marriage, equal marriage, and gay marriage.

taboo. Same-sex marriage has existed throughout all of history. In ancient times the unions were not sanctioned by any governing body but ceremonies were held in various parts of the world where individuals of the same sex would have arrangements or contracts, binding them to each other. In some cultures, these marriages were culturally acceptable, however in ancient Rome a law was put in place by Constantia's II and Constants that condemned marriages between partners of the same sex. The punishment for breaking this law was death. The same-sex marriage debate in the United States has been going on for decades. In 1971 two students from the University of Minnesota filled out an application for a marriage license and were denied by the clerk because the couple consisted of two members of the same sex. James Michael McConnell and Richard Baker argued that the U.S. Constitution does not state that individuals must be in a heterosexual relationship in order to be legally married. The claim made it to the Supreme Court, where it was dismissed and no license was issued.⁷ The earliest western document concerning homosexual relationship comes from Ancient Greece, where same sex relationship was the societal norm. Even homosexual marriages have occurred with relative frequency in the past, both within Christian and non-Christian communities. Researchers suggest that the Catholic Church, which has been extremely vociferous in its opposition to homosexuality in general, approved of same-sex marriages for over 1 500 years, only ceasing to perform them in the nineteenth century. However the term homosexuality appears in print for the first time in 1869 in an anonymous German pamphlet paragraph 142 of the Prussian penal Code and Its maintenance paragraph 152 of the Draft of a Penal Code for North German Confederation written by Karl Maria Kertbeny. This pamphlet advocated the repeal of Prussia's sodomy laws. Thus homosexuality is not a new phenomenon. Even instances of homosexuality are available in Hindu Mythology. The literature drawn from Hindu, Buddhist, Muslim, and modern fiction also testifies the presence of same-sex love in various forms. Ancient texts such as the Manu Smriti, Arthashastra, Kamasutra, Upanishads and Puranas refer to homosexuality.⁸ Also there are reports that same-sex activities are common among sannyasins, who cannot marry. Thus instances of homosexuality are available in historical and

⁷ <http://www.datehookup.com/singles-content-the-history-of-samesex-marriage.htm>

⁸ Sandeep Roy Chowdhury, 'The best of both worlds? South Asian bisexuals speak out,' India Currents, February issue, 1996.

mythological texts world over and India is not an exception to this.

Social Issue:-

Indian society is a traditional multicultural diversified integrated society where in Hinduism dominates. And for Hindus marriage is an enduring heterosexual Sacrament. Other Indian communities also have similar opinion that marriage is a heterosexual institution. This is supported by Vishwa Hindu Parishad Party, whose president says for Hindus, this kind of behavior is not just against nature, it is against our culture. The strong reaction of society is that many people deny the existence of sexual minorities in India, dismissing same-sex behavior as a Western, upper class phenomenon. Many others label it as a disease to be cured, an abnormality to be set right or a crime to be punished. While there are no organized hate groups in India as in the West, the persecution of sexual minorities in India is more insidious.⁹

Homosexuality cannot be legalized in India as the Indian Society is intolerant to the practice of homosexuality/lesbianism.

- A. The state has not just a function to, but actually a duty to stop unnatural sex, or else the social order would break down., law lose its legitimacy et al;
- B. Our society does not tolerate homosexuality, and notwithstanding the universality of human rights or the universal applicability of our fundamental rights and freedom, its criminalization is therefore justified;
- C. It is really not our thing , it's something that happens out there in the west, we do not have to copy that. In other words the three pillars of the classic culture arguments to criminalize the likes of us.

Homosexuality in India :-

In India, homosexuality has been a taboo since a very long time. Marriage is considered to be a holy sacrament by Hindus, and union between persons of the same sex has been considered to be immoral and inappropriate. Since marriage is seen mostly from a religious angle, a gay marriage is presumed to be unholy and against God himself. It is believed by many Indians, that concept of same sex unions has been brought by the western countries, and it is bad western influence on the Indians that is leading

⁹ According to a report published by the People's Union for Civil Liberties – Karnataka in February 2001

to their rise. However, homosexuality is not a concept devised by the west, as many who oppose this notion gneiss believe. References of homosexuality can be found in our ancient literatures and scriptures, which reflect that the concept was prevalent in our society since ancient time. **Rigveda**, one of the four canonical sacred texts of Hinduism says “Vikriti Evam Prakriti” (what seems un-natural is also natural), which some scholars believe recognizes the cyclical constancy of homosexual/transsexual dimensions of human life, like all forms of universal diversities. Historical literary evidence shoes that homosexuality has been prevalent across the Indian subcontinent throughout the history. Homosexuality is a type of sexual orientation characterized by sexual desires or romantic love exclusively or almost exclusively for people who are identified as being of same sex. People, who are homosexual, particularly are males are known as “gay”, and female homosexuals are known as “lesbians” “It can also be defined as sexual relations with another of same sex regardless of one's sexual orientation, self identification or gender identity. It refers to “an enduring pattern of or disposition to experience sexual, affectionate, or romantic attractions” to people of the same sex.

SECTION 377 OF THE INDIAN PENAL CODE, 1860

There is no explicit mention of homosexuality or hemophilia in any of the statute books of India. A person cannot be prosecuted for being a homosexual or hemophilic. The offence of homosexuality is read under this section as an Unnatural Offence¹⁰. The term Carnal Intercourse used in this section refers to sexual intercourse between men or in other words, homosexual relationships. But Section 377 of the Indian Penal Code, 1860 which was introduced in India during the British rule, Criminalized sexual activity “Against the order of Nature.”

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment of either description for a term which may extend to ten years and should also be liable to fine.¹¹

¹⁰Ratanlal & Dhirajlal, The Indian PenalCode,529(Wadhwa Law Publishers,New Delhi,28th edition).

¹¹ Surendra Sahai Srivastava,Indian Penal Code,489(Central Law AgencyAllahabad,4th edition).

This section criminalized consensual homosexual activities also. However, the Delhi High Court passed a landmark judgment, decriminalizing homosexual intercourse between consenting adults.¹² Section 377 of the Indian penal code was adjudged to violate the fundamental right to life and liberty and right to equality as guaranteed by the constitution of India.

Sec 377 violates the enjoyment of civil laws and gay men and Lesbians and leads to other adverse effects :

Section 292 of IPC punishes Obscenity; the current definition of obscenity can lead it to incriminate the gay and lesbians writings. As male homosexuality is a criminal offence, the presumption is that it is something depraved and can corrupt the minds and bodies of the persons. In the prevailing atmosphere the lesbians and the gay men can be criminalized, as homosexuality is treated as something immoral or depraved. The workman's Compensation Act, 1923¹³ provides that in case of death caused by injury at the work place, the dependents of the employee are entitled to receive the compensation from the employer, the dependents will include a widow, a minor legitimate son, unmarried daughter, widowed mother and an infirm son or daughter. Thus a gay or a lesbian couple cannot claim the benefits under this section. This is not an isolated example and there are other such Acts that are discriminatory towards homosexuals. There are Provident Fund Scheme, 1952¹⁴ and the Payment of Gratuity Act, 1972. Naz Foundation, a nongovernmental organization in the year 2001, filed a law suit in the Delhi High Court asking for a legislation of homosexual intercourse between consenting adults. The court however refused to entertain their petition as it is said the petitioner had no locus standi in the matter. On further appeal to the Supreme Court, the SC held that Naz foundation had the locus standi to file a PIL in this matter, and the case was sent back to the Delhi High Court. In 2006, the National Aids Control Organization filed an affidavit stating that the enforcement of Section 377 violates LGBT rights. Subsequently, there was a significant intervention in the case by a Delhi based coalition of LGBT, women's and human rights activist called "Voices against 377", which supported the demand to "read down" sec 377 to exclude adult consensual sex from within its purview. On 2 July, 2009 it was held that section 377 of Indian penal code was in violation of the

fundamental rights to dignity and privacy within the right to life and personal liberty guaranteed by Article 21 of the Indian Constitution. The court also held that section 377 was against Article 14 and 15 of the constitution, as it discriminated homosexuals and created a class discriminating them on the basis of sex. The court held that the word "sex" in Article 15 not only includes biological sex, but also the sexual orientation of a person. The judgment says many gay parades and festivals in the city, rejoicing and celebrating the Delhi High Court decision. The judgment can be seen as a pioneering step in advocating the rights of homosexual.

CONSTITUTIONAL PROVISIONS:-

Section 377 of IPC violates the fundamental rights guaranteed under part III of the constitution.

1. Article 14 of the constitution provides equality before law¹⁵: This Article says that every person is equal in the eyes of law. Then why homosexuals are not treated equally with heterosexual. This Article also provides **protection of laws equal¹⁶** and says that basis of classification must have a rational or reasonable nexus with the object sought to be achieved by the legislation. However in criminalizing homosexuality in sec 377, the classification between natural sex and unnatural sex is that those sexual activities that are performed for procreation are natural and those that are not performed for procreation are unnatural. Hence, it labels all non procreation sexual act as unnatural. The object sought to be achieved by legislation through this provision is to create the public code of sexual morality but this object does not have a reasonable classification and rational nexus with the classification of natural and unnatural sex. The unreasonable classification in this provision is based on the fact that main aim of any sexual activity is procreation. This classification seems to be unreasonable in the present scenario as it took place in 1860 when any sexual activity that was not meant for procreation was considered a sin. At that time there was no concept of individuality. But now individual become more independent and rational. For them Procreation is not the main aim of sexual activities. Moreover homosexual activity can never be termed as unnatural. Thus the very objective of the section is facile, unscientific and based upon prejudice alone. Therefore sec 377 of IPC, which

¹² Naz Foundation v. Government of NCT of Delhi on 2 July, 2009

¹³ Workmen's Compensation Act, S. 2(d) (1923).

¹⁴ Employment Provident Fund Scheme, S. 2(g) (1952).

¹⁵ J.n.pandey, constitutional law of india 77 (central law agency, allahabad 53rd edition).

¹⁶ DD.Basu, Constitutional Law Of India, 34 (LexisNexis Butterworths Wadhwa Nagpur, New Delhi, 8th edition).

criminalizes the homosexuality relying on the unreasonable classification based on procreation, is an absolute violation of this Article.

2. **Article 15 says that there shall be no discrimination based on sex**¹⁷: This article is that no person shall be subject to any disability, liability restriction or condition on the ground of sex or gender. Moreover sec 377 criminalizes the sexual relationship between two people of same sex i.e homosexuals. Thus this provision of IPC discriminates against the homosexuals because of their sexuality and therefore constitutes discrimination based on sexual orientation.

3. **Article 21 of the Indian constitution**¹⁸ prohibits the state from interfering with the private personal activities and personal liberty of the individual. The term personal liberty is a compendious term to include within itself all the varieties of rights that goes to make up the personal liberties of a person. It would include the privacy and sanctity of a person's home as well as dignity of the individual. According to the supreme court of U.S.A in **Lawrence v. Texas** Liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining of sex. The central idea behind the concept of personal liberty and privacy is that the quest of happiness of the individual must be fulfilled. Homosexual conduct is very personal conduct and they do it for the sake of happiness. It is just a way to pursuit of happiness, a way to achieve a sexual happiness or desire. Article 21, also says that state can deprive any person from his personal liberty and privacy according to the procedure established by law. Therefore, Sec377 can restrict homosexuals from their personal liberty and privacy. **But in Maneka Gandhi's case**,¹⁹ it has been held that the state can deprive any person only then the procedure cannot be arbitrary, unfair or unreasonable. The procedure must be right, just and fair and not arbitrary, fanciful or oppressive, otherwise it would be no procedure at all and the requirement of Art 21 would not be satisfied. The provision of Sec377 of IPC is an arbitrary, unfair and unreasonable provision it criminalize homosexuals because of their infertility or unproductiveness that gives a very narrow sense of classification between homosexuals and heterosexuals. Thus by criminalizing

¹⁷ ¹⁷ V.N. Shukla's, Constitution of India, 81 (Eastern Book Company, Lucknow, 11th edition).

¹⁸ Narender kumar, constitutional law of india, 228 (central law agency, Allahabad)

¹⁹ J.n.pandey, constitutional law of india, 257 (central law agency, Allahabad, 53rd edition).S

homosexuality in sec377 it restricts them to enjoy their right to personal liberty and privacy given in Art21 and the procedure is arbitrary, unfair and unreasonable, therefore it is not procedure at all. . **In R. Rajagopal v. State Of T.N**²⁰ held that right to privacy is implicit under Article 21. Any consensual sexual act between two individuals is their personal affair and any intervention in it by State would lead to disturbance in their privacy and thus, under Article 21 as well. **In National Coalition for Gay and Lesbian equality v. Ministry of Justice**²¹, South African court held that, Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. Even at the international level, the right to privacy has been recognized in the favor of lesbians and gay man. The meaning and the content of fundamental rights guaranteed in constitution are of sufficient amplitude to encompass all the facets of gender equality including same sex relationships. Moreover Sec377 criminalizes same sex relationship. Thus this provision is inconsistent with fundamental rights and according to **sec 13 of constitution**, which says that those laws which are inconsistent with fundamental rights must be void. Sec 377 is void, not the whole section is void only part of the section is void by applying the doctrine of severability.²²

Cases under homosexuality-

In the history of the statute from, 1860 to 1992 there were only 30 cases in the High Courts and Supreme Court. Out of these 30 cases, 18 were non-consensual, 4 were consensual of which 3 were before 1940 and 8 were unspecified and 15 out of 30 cases registered were assault on minors.²³ In a judgement (**Fazal Rab Vs State of Bihar**)²⁴ the Supreme Court was dealing with a case where a man had homosexual relations with a boy with the consent of the boy.²⁵ The Supreme Court in 1983 observed that: 'the offence is one under Sec. 377, IPC which implies sexual perversity.'²⁶

²⁰ 1994 SCC (6) 632

²¹ 1999 (1) SA 6

²² V.n.shukla's, constitution of india, 37 (eastern book company, Lucknow, 11th edition).

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www.ilga.info/Information/Legal_survey/Asia_Pacific/india.htm

²⁴ AIR 1983 (SC) 323.

²⁵ <http://gendwaar.gen.in/rep9.pdf>

²⁶ In this case perversity was treated synonym for homosexuality

In 1992, 18 men were arrested from a park in New Delhi on the suspicion that they were homosexuals²⁷. After protest and demonstration by gays, lesbians and human rights groups, they were released from police custody after filing a petty case against them. In fact they were not indicated under Sec. 377 but under the provision of public nuisance under the Delhi Police Act.²⁸ Similarly in 2001, the Delhi High Court admitted a petition challenging the constitutional validity of the article on the ground that it "criminalizes homosexual acts" even between two consenting adults and impedes AIDS control efforts among homosexuals.²⁹

Progressive Movement:- Gay rights activists have been battling against Section 377 for a decade. In Feb 99 there was second national LGBT³⁰ conference Indian National Gay Conference YAARIAN -99. The voluntary organization, argued that it is wrong for homosexuality to be a punishable offence in 21st century India.³¹

The most recent legal challenge comes from the Naaz Foundation Trust, New Delhi. Naaz India has filed a writ petition challenging Section 377 in the Delhi High Court on December 7th, 2001 on the grounds that include:

Section 377 violates the right to life and personal liberty, the right to equality and the right to

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www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-28

www.altlawforum.org/PUBLICATIONS/PUCL%20REport%201

²⁹ The petition urges that Sec. 377 is obsolete and must be struck down as being unconstitutional on the grounds that Right for Privacy is part and parcel of the Fundamental Rights of life and liberty under Article 21 of the constitution and recognised by the 1948 International Convention on Human Rights. Sec. 377 is a violation of Article 14 of the constitution since it discriminates persons on the basis of their sexual orientation; having been enacted in 1860, Sec. 377 is archaic, absurd and implemented by the British in all its colonies, including India, but now been repealed in England, the country of origin.

³⁰ LGBT is an acronym used as a collective term to refer to lesbians, gays, bisexuals, and transgender people. It is considered less controversial than the terms "queer" or "lesbigay stands for Lesbian Gay Bisexual Transgender.

³¹ Naaz Foundation Trust, New Delhi.

freedom guaranteed to all citizens as Fundamental Rights under Chapter III of our Constitution.³²

Need for Legal Recognition:-

Every citizen has a fundamental right to life guaranteed by the Indian Constitution. This may be interpreted as- if a citizen chooses a gay partner in his/her life, it may be allowed. As marriage is a legal way of binding two people, the gay relationship can be legalized through marriage which will prevent the cases of illegitimate secret relations. Another logical point in respect. A satisfactory personal life is as much a right of gay couples as straight couple. People who are not religious choose to get married in a registry office and not in church. Marriage shows the strongest commitment that can make to one another. Gay men and lesbians are just as human and have the same needs and desires as heterosexual human beings. Getting married is the ultimate way of showing your love and commitment to your partner, so why should gay people be deprived of this right. If people find gay relationships contrary to their religion, it is up to them to refrain. Same sex marriage should not be made legal "because they do not produce kids" is ridiculous. If two people each other and want to unite their destinies, then it is a beautiful thing which should be celebrated. Whether it is called "marriage" or "life Pact" does not matter. Same sex unions harm no one; one's support or opposition to this is a matter of personal belief and morality, with which the government has no business to interfere.

A. There is no moral ground on which to support the tradition of marriage as a heterosexual institution. For e.g. slavery once existed but now abolished on humanitarian ground.

B. If it was so then there would have been attempt to prohibit unions between a sterile woman and a fertile man or vice versa. Nor does legislation exist which requires a married couple to have children. It is true that homosexuals cannot procreate within their union but there are many options available which enable them to have children, including adoption and artificial insemination.

C. Homosexual marriages is not an untried experiment. In Denmark since 1989 homosexuality

³² Although the high court in Delhi has dismissed the legal petition that sought to legalise homosexuality. The court ruled that the "validity of a law" cannot be challenged by anyone who is "not affected by it".

is legally permitted. The result of the experiment suggests that homosexual marriages has actually been civilizing and strengthening, not just the institution of marriage but the society as a whole. So perhaps we should accept the fact that some one else has already done the experiment and accept the result as positive

D. Instances of homosexuality can be seen even in ancient , medieval and modern India. Its not the development of post modern society.

E. Denial of legal recognition infringes the rights of citizen

F. Scientific studies and psychologists are of the opinion that the love and commitment of the parents make difference not the gender. The children raised by homosexual partners are just as good as those of straight couples.

Judicial Approach In India:-

- In 1991, for first time through its article Less than Gay: A Citizen's Report, brought forward the problems with Article 377 and asked for its repeal.³³ As over years, no change and years could be seen, till Naz Foundation (India) Trust, an activist group, took the issue.

*Naz Foundation v. Govt. of NCT of Delhi*³⁴ [160 Delhi Law Times 277],

Naz Foundation took the issue in 2001, by filing a Public interest Litigation (PIL) to Delhi High Court for legalizing of homosexual intercourse, by free consent between the adults. Delhi High Court dismissed the petition stating that Naz Foundation (India) Trust has no locus standi. Later Supreme Court of India sent the case back to the Delhi High Court to reconsider it on merit, and favored Naz Foundation's filing of PIL.

Decided by a two-judge bench comprising of then Chief Justice Ajit Prakash Shah and Justice S. Muralidhar, High Court, held that treating consensual homosexual sex between adults as a crime violates fundamental rights, resulting in decriminalization of homosexual acts involving consenting adults.

³³ *AIDS Bhedbhav Virodhi Andolan,*
³⁴ (Delhi High Court 2009).

Later, it was challenged in the Supreme Court of India.

*Suresh Kumar Koushal and another v. NAZ Foundation and others*³⁵

On 11 December 2013, the Supreme Court of India overturned the 2009 judgment given by the High Court of Delhi stating that judicial intervention was not required in this issue. The Supreme court bench of justices G. S. Singhvi and S. J. Mukhopadhaya stated that Section 377 IPC does not suffer from any vice of unconstitutionality and held High Court of Delhi decision as legally unsustainable. and asked Parliament to take the issue.

• 2014

In January 2014 when review petition was filed against the above judgment, it was dismissed by Supreme Court.

• 2016

Later, for final hearing of curative petition in the Supreme Court of Naz Foundation and others on 6 February 2016, three-member bench headed by then the Chief Justice of India T. S. Thakur stated that the petitions raise "significant questions of constitutional law" and referred it to a 5 judge bench to determine the said questions which means the court was satisfied that there was a "substantial question of constitutional law" have aroused.

- It would be worthy to note that *Suresh Kumar Kaushal v Naz Foundation* contradicts the later judgment in *National Legal Services Authority v Union of India*³⁶ where observations regarding sexuality and gender identity and, in particular observations regarding the use of 377 made and transgender were considered as 'third gender' and providing them with their fundamental rights.
- LGBT rights include gay marriage rights; hence an image below depicts the history of battle of LGBTs for their rights.

Conclusion:-

The demand for legalizing homosexual marriage is somehow overlooked and ignored. So, it is high time for the Legislature, Executive, Judiciary and Society at large that they cannot demand the

³⁵ CIVIL APPEAL NO.10972 OF 2013.
³⁶ (WP (C) of 2012).

existence of people with same sex desires. They also need to acknowledge that by legalizing homosexual relations they will not permit a mere sexual activity but will also decriminalize the lives of citizens who are connected to such sexual act. The sexual attraction or the romantic behavior among people belonging to same sex group leads to homosexuality. It could be either situational or enduring disposition. As a sexual orientation, homosexuality is considered to lie within the heterosexual-homosexual continuum of human sexuality, and refers to an individual identity based on those attractions and membership in a community of others who share them. Homosexuality is found in many animal species. It is really difficult to determine accurately the prevalence of homosexual nature among the human beings. It was a major setback for the LGBT (lesbian, gay, bisexual, transgender) community, which has been fighting to win acceptance in a country where large sections are still conservative and frown upon homosexuality. Homosexuality is a complex phenomenon endemic to all societies. Though homosexuals are in minority but they have always been a part of our society. Heterosexuality might be 'common' but it might be not be 'normal' for everybody. Keeping homosexuality under cover only leads to persecution, blackmailing and harassment of individuals. Hence, the same sex relationships should be legalized in India and the Section 377 of the Indian Penal Code (IPC) should be changed to bring a respite to people with different sex orientations. Even today majority of Indians are not comfortable with homosexual marriages for oneself. But at the same time the demand for legalizing homosexual marriages is grave and intense but somehow not getting approval of society and is under cover. It seems as if still it is long way to go for social acceptance of the homosexual marriages in India. As the legal recognition of homosexual unions would mean not only approval of homosexual behavior with the consequence of making it a model in present day society but may also obscure the basic values (of family, marriage, procreation and continuity of Species) which belong to common inheritance of humanity. But at the same time Indians should realize that sex orientation is biological and is a natural process it's not a disease. It's true that the acceptance of the demand for social and legal recognition of homosexuality has not been approved today but in any case homosexual community should not be exploited and mistreated.